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August 9, 1999

**Hand Delivered**

Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 - 12th Street, S.W., TW-A325  
Washington, D.C. 20554

RECEIVED

AUG 9 1999

Re: ***Ex Parte Presentation***  
***CPNI - CC Docket No. 96-115***

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dear Ms. Salas:

This letter serves as notice that on Thursday, August 5, 1999, the attached documents concerning the above-captioned proceeding, were hand-delivered to the individuals listed below:

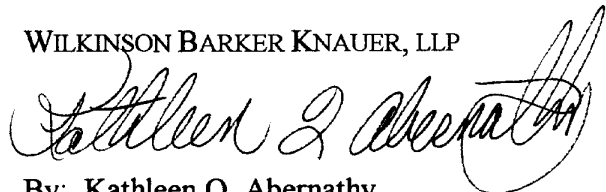
Dorothy Atwood, Legal Advisor to Chairman Kennard  
Peter Tenhula, Senior Legal Advisor to Commissioner Powell  
Sara Whitesell, Legal Advisor to Commissioner Tristani  
Linda Kinney, Legal Advisor to Commissioner Ness  
Bill Bailey, Legal Advisor to Commissioner Furchtgott-Roth  
Robert Atkinson, Deputy Chief, Common Carrier Bureau

Pursuant to Section 1.1206(a), an original and one copy of this letter are being filed with your office. Please associate this letter with the file in the above-captioned proceeding.

Should you have any questions regarding this matter, please contact the undersigned.

Sincerely,

WILKINSON BARKER KNAUER, LLP



By: Kathleen Q. Abernathy  
Counsel for Arch Communications Group, Inc.

**Attachment**

cc: Dorothy Attwood  
Peter Tenhula  
Sarah Whitesell  
Linda Kinney  
Bill Bailey  
James Schlichting  
Robert Atkinson

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Dorothy Attwood, Legal Advisor  
Office of Chairman William E. Kennard  
Federal Communications Commission  
445 - 12th Street, S.W., Room 8-B201  
Washington, D.C. 20554

Peter Tenhula, Senior Legal Advisor  
Office of Commissioner Michael Powell  
Federal Communications Commission  
445 - 12th Street, S.W., Room 8-A204  
Washington, D.C. 20554

Dear Dorothy and Peter:

Thank you again for meeting with us to discuss the FCC's CPNI rules and their applicability to commercial mobile radio service providers. As we discussed on behalf of Arch Communications Group, Inc. and PageNet, Inc. the customer experience when purchasing wireless services, such as paging, is very different than the traditional wireline experience. In an effort to respond to some of the questions raised during our meetings, I am attaching a legal analysis that demonstrates how the customer experience of CMRS consumers relates to the legal standards set forth in Section 222(c)(1)(B) of the Communications Act.

Please feel free to contact either me, Ken Patrich or Judith St. Ledger-Roty if you have any questions.

Sincerely,

WILKINSON BARKER KNAUER, LLP



By: Kathleen Q. Abernathy

Counsel for Arch Communications Group, Inc.

**Attachment**

cc: Sarah Whitesell  
Linda Kinney  
Bill Bailey  
James Schlichting  
Robert Atkinson

### **Analysis of Section 222(c)(1)(B) of the Communications Act**

Section 222(c)(1)(B) of the Act sets forth an exception to the general prohibition against the use of CPNI with regard to information related to services that are “necessary to, or used in” the underlying telecommunications service. In the *Second Report and Order*, the Commission concluded that CPE and information services do not fit within the definition of “necessary to, or used in,” and that, accordingly, CPNI could not be used to market these products. This determination was based, in part, on the finding that “restrictions on CPNI sharing in the context of CPE and information services would be contrary to customer expectations, as well as detrimental to the goals of customer convenience and one stop shopping.” ¶ 76.

While these conclusions are correct with regard to most segments of the telecommunications industry, Arch and PageNet believe the record demonstrates that a different interpretation is warranted in the context of CPE and information services associated with CMRS offerings. The record provided on reconsideration demonstrates that CMRS products, as distinguished from other telecommunications services, have historically been marketed differently and consumers have come to expect and rely upon these CMRS marketing practices. Indeed, permitting CMRS carriers to use a customer’s information regarding CPE and information services is necessary to avoid customer confusion and to ensure that customer expectations continue to be met.

#### **CPE**

The CPE associated with mobile services is clearly distinguishable from landline CPE, and necessarily requires a very different level of consumer education in order to avoid confusion. For example, whereas landline CPE can be plugged into any jack anywhere, consumers must be made aware that mobile CPE (whether used with broadband CMRS or paging services) must be tuned to the frequency of the underlying carrier, and that the CPE associated with wireless services is designed to be used in conjunction with specific network standards. For example, the CPE associated with broadband services is designed for use with particular wireless technologies such as CDMA, GSM or TDMA. Paging or messaging CPE must be designed for use with Potsag, FLEX, REFLEX or other standards. Similarly, in order for consumers to upgrade from analog to digital cellular systems,<sup>1</sup> or from standard to advanced messaging services, they must learn about, and receive, new CPE compatible with the new service. In short, consumers are harmed when carriers attempting to market upgraded services are unable to fully inform customers about the CPE associated with the new services. Based on these factors, the correct conclusion is that mobile CPE is “necessary to or used in” the underlying mobile service, and therefore is a permissible use of CPNI pursuant to Section 222(c)(1)(B).

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<sup>1</sup> The availability and benefits of dual mode or tri-mode phones is another matter about which consumers must be apprised.

## Information Services

In addition, information services provided in connection with CMRS, as opposed to other telecommunications services, are similarly necessary to or used in the provision of CMRS services. As a result of historical experiences and technical requirements, customer expectations regarding wireless information services are different than the expectations for wireline services that were discussed in the *Second Report and Order*.<sup>2</sup> Whereas information services in the landline context are “provided to consumers independently of their telecommunications service”<sup>3</sup> — and often are available from numerous unaffiliated sources, many of whom are not telecommunications carriers — wireless information services are integrated into the underlying service to a degree that they are necessary to or used in the provision of the underlying service itself. Indeed, digital broadband service and advanced messaging services usually incorporate voice mail, caller ID and paging services as part of the telecommunications service package. Even when a customer initially subscribes to a limited package of services, the expectation is to receive information about more advanced capabilities as those might become useful. As a result, consumers look to their wireless carriers for these services and expect to receive marketing information from their carriers as part of their total service relationship.

For example, a consumer of local exchange services has the ability to obtain messages when away from home by purchasing the local exchange carrier’s voice mail services, voice mail service from an independent provider, or by acquiring his/her own answering machine. However, in the wireless industry today, virtually all of these voice mail services are obtained from the consumer’s telecommunications service provider. The consumer, therefore, cannot acquire these services without also acquiring the provider’s underlying wireless service. Many other wireless information services are similarly integrated with the underlying telecommunications service, such as when a mobile handset or two-way paging device is used to retrieve e-mail messages or to access Internet services, or when a CMRS provider offers delivery of stock quotes, news, or similar information to mobile CPE equipped with digital display screens.

Moreover, the current record demonstrates that wireless information services are “used in” the underlying CMRS service in a manner similar to those services characterized as “adjunct to basic” in the *Second Report and Order*. Wireless notification services, for example, involve the transmission of a message to a device solely to notify the customer that a voice message exists (or in some instances, that an alarm monitoring signal has been received). Such services facilitate the use of messaging service, much as adjunct to basic services facilitate the use of traditional telephone service.

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<sup>2</sup> See *SR&O*, ¶ 72.

<sup>3</sup> *Id.*

In short, the record demonstrates that information services associated with CMRS are integral to the underlying service, and therefore, customers expect to receive information about these services from the carrier with whom they have chosen to do business. Accordingly, the Commission should conclude that for CMRS services, an information service is necessary to or used in the provision of CMRS service when the information service utilizes CMRS to deliver or access the service. Thus, a CMRS provider may use CPNI, without customer approval, to market information services that are accessed or delivered by means of CMRS. If a CMRS provider seeks to market an information service that is not associated with the underlying CMRS service, however, it must first obtain customer approval.

## Proposed CPNI Rule

Section 64.2005(c) —

New subpart 4

- (4) CMRS providers may use CPNI, without customer approval, to market equipment that may be used to receive a CMRS service or information services that utilize a CMRS service in its delivery or use. For example, a paging provider offering delivery of e-mail to a paging device may utilize CPNI to market internet access services accessed by way of the paging device, but not internet access services accessed solely by way of landline phones.

### **Illustrations:**

Customers expect CMRS services to include all services accessed or received by use of the CMRS device. CMRS providers historically have offered information services and CPE without distinction from the underlying telecommunications service, and in many instances the customer is not able to receive the service (*e.g.*, voicemail for wireless services) except through the telecommunications service provider.

CMRS providers may use CPNI to market equipment capable of receiving new or different CMRS services.

CMRS providers may use CPNI to market information services which include as an element of the service notification by means of the CMRS device.

CMRS providers may use CPNI to market information services delivered to the wireless device, such as news or stock quote services.

CMRS providers may use CPNI to market internet services accessed by means of the CMRS device but not dial-up internet access services accessed through landline phones.